IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 3

MURRAY WINTERS,

Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

APPELLANT'S BRIEF

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Point III

In answer to this Court's questions:

> "3. In view of the construction herein given by the Court of Appeals to subsection 2 of section 1141 of the New York Penal Code, what was the law, binding upon this Court, which governed the acts for which the conviction herein was had? Was the conviction under such controlling law, as applied to this defendant at that time, compatible with the Fourteenth Amendment?"

appellant contends that:

A. The law, binding upon this Court, which governed the acts for which the conviction herein was had, is the law as it was when those acts were committed.

B. The conviction under such controlling law, as applied to this defendant at that time, was not compatible with the Fourteenth Amendment.

C. It makes no difference what law is binding on this Court, whether it be (1) the statute itself as it read when Winters was arrested and the information against him filed, or (2) the statute as construed by the Court of Special Sessions in convicting Winters under the statute so con-

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Statement

This brief is submitted in pursuance of an order of this Court, entered herein on June 23, 1947. That order set forth three questions. There are three Points in this brief. Each Point answers one of those questions, and incorporates, in the Point heading, the question thus answered. This brief is not intended to replace appellant's original brief herein, but is supplemental thereto.

POINT I

In answer to this Court's question:

"1. Is subsection 2 of section 1141 of the New York Penal Code, as construed by the Court of Appeals, compatible with the Fourteenth Amendment?"

it is appellant's contention that the statute, as construed by the Court of Appeals, violates the Fourteenth Amendment's guaranty of freedom of the press.

A detailed analysis of the Court of Appeals' opinion shows that its construction of the statute

(a) covers only a part of the statute, and does not profess to cover every situation to which the statute could be extended;

(b) does not exclude prosecution for proper writings (1) under that part of the statute that is construed, or (2) under those parts of the statute that were not considered by that Court;

(c) establishes as the test of criminal liability one that has been repudiated by this Court, namely, a bad tendency of the writing;

(d) leaves the statute vague and indefinite; and

(e) effects an unconstitutional repression of the freedom of the press.

The majority opinion begins by quoting the statute, that it is directed against "criminal news, police reports, or accounts of criminal deeds, or pictures or stories of deeds of bloodshed, lust or crime," and states that the magazines found in Winters' possession were "composed entirely of such pictures and stories" (R. 45).

It continues with the statement that the "full literal meaning" of the statute, that it condemns the publications named in the statute "regardless of the manner of treatment", may be "dismissed at once on the short ground that its manifest injustice and absurdity was never intended by the Legislature" (R. 45).

It then holds that the statute is concerned with "indecency or obscenity", not as regards "that form of immorality which has relation to sexual impurity" (R. 45), but in the following respect:

> "Indecency or obscenity is an offense against the public order. (9 Halsbury's Laws of England (1st ed.), 530, 538; Harris & Wilshire's Criminal Law (17th ed.), 216; 1 Bishop's Criminal Law (9th ed.), 500, 504.)[1] Collections of pictures or stories of criminal deeds of bloodshed or lust unquestionably can be so massed as to become vehicles for inciting violent and depraved crimes against the person and in that case such publications are indecent or obscene in an admissible sense, though not necessarily in the sense of being calculated or intended to excite sexual passion. This idea, as it seems to us, was the principal reason for the enactment of the statute" (R. 46).

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1 In this the Court of Appeals overlooked the fact that the legislature is not free to punish anything which was criminal at English common law. That was one of the objects of the Revolution—"to get rid of the English common law on liberty of speech and of the press" (Prof. Chafee—*Free Speech in the United States*, pp. 19-20).

The foregoing reveals several significant and important facts.

1—In arriving at, and in giving this definition and construction, the Court of Appeals was considering, and concerned with, (a) "indecency or obscenity" as "an offense against the public order" not related to "sexual impurity," but still only a form of "indecency or obscenity", and not (b) incitement to crime.[2] This is shown not only by the language employed in the above quotation, but also by reading it together with the preceding paragraph of the opinion (as it clearly was intended by the Court of Appeals to be read), with which it forms an integral part of the opinion (R. 45-46).

2—In an earlier part of its opinion the Court of Appeals recognized that the statute was directed against "criminal news" and "police reports" as well as against "accounts of criminal deeds, or pictures or stories of deeds of bloodshed, lust or crime" (R. 45). However, its definition of "indecent or obscene publications" and its construction of the statute were solely concerned with, and limited to that part of the statute that related only to "collections of pictures or stories of criminal deeds of bloodshed or lust." It did not include within its definition that part of the statute that proscribes "criminal news" and "police reports." This leaves the statute still directed against "criminal news" and against "police reports," each expressly included in the statute by the legislature, and not exempted therefrom by the Court of Appeals.

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2 This is further evidenced by a subsequent part of the opinion (R. 47), hereinafter quoted and discussed at pages 6 to 7.

Nor did that Court go into the question of "whether the statute extends to accounts of criminal deeds not characterized by bloodshed or lust" (R. 46).

3—The Court of Appeals did not limit the application of the statute exclusively to "collections of pictures or stories of criminal deeds of bloodshed or lust * * * so massed as to become vehicles for inciting violent and depraved crimes against the person." It stated that "This idea * * * was the principal [not the "sole" or the "exclusive"] reason for the enactment of the statute". This is a tacit admission that there may be other writings to which the statute may be extended. In fact, the Court of Appeals never said that the magazines in this case incited to crime, or that they were "vehicles for inciting * * * crimes." It based its conclusion (set forth in the next paragraph of its opinion [R. 46]) that "the magazines which were taken from the defendant's premises were obnoxious to the statute" on the following description it gave of the contents of the magazines—"The contents are nothing but stories and pictures of criminal deeds of bloodshed and lust. The Appellate Division said: 'The stories are embellished with pictures of fiendish and gruesome crimes, and besprinkled with lurid photographs of victims and perpetrators. Featured articles bear such titles as "Bargains in Bodies," "Girl Slave to a Love Cult" and "Girls Reformatory." ' It is not suggested that any of the contributors was distinguished by his place in the literary world or by the quality of his style (cit.). In short, we have here before us accumulations of details of heinous wrongdoing which plainly carried an appeal to that portion of the public who (as many recent records remind us) are disposed to take to vice for its own sake" (R. 46). Saying that the magazines "carried an appeal" to those "disposed to take to vice for its own sake" is a far cry from saying that they were "vehicles for inciting violent and de-

praved crimes." The Court of Appeals' description of the magazines in this case, coupled with its statement that "the magazines * * * were obnoxious to the statute," shows conclusively its intent to have the statute bar such writings. Surely, such a statute, no matter how much we may dislike these magazines or such writings generally, is an unconstitutional repression of a free press.

4—Although it did not use the word "tendency", the Court of Appeals, in referring to stories of criminal deeds "so massed as to become vehicles for inciting violent and depraved crimes," was establishing the tendency of the magazines as the test of criminal liability. It never spoke of stories that actually incited to crime. Nor did it say that the magazines in question, or any of the stories therein, actually incited to crime. This is shown also by its description of the magazines in the following paragraph of its opinion (R. 46), quoted and discussed in the paragraph numbered "3" immediately preceding this paragraph.

The Court of Appeals did not dispute, but tacitly admitted the appellant's contention that "the criterion of criminal liability [under the statute] is a personal taste standard, uncertain, indefinite and *ex post facto* in its practical operation" (R. 47). It said that this did not render the statute unconstitutional because:

> "In the nature of things there can be no more precise test of written indecency or obscenity than the continuing and changeable experience of the community as to what types of books are likely to bring about the corruption of public morals or other analogous injury to the public order. Consequently, a question as to

whether a particular publication is indecent or obscene in that sense is a question of the times which must be determined as matter of fact, unless the appearances are thought to be necessarily harmless from the standpoint of public order or morality" (R. 47).

It will be noted from this that:

1—The Court of Appeals based its decision on the ground that the statute is directed against books that are "likely to bring about the corruption of public morals or other analogous injury to the public order"; and that it decided that it would be a question of fact in each case "as to whether a particular publication is indecent or obscene in that [the above-quoted] sense" unless the publication was "necessarily harmless from the standpoint of public order or morality." This shows that the Court of Appeals did not limit the application of the statute to books that incite to crime, but included within its scope books "likely to bring about the corruption of public morals or other analogous injury to the public order"; that it considered such books as being "indecent or obscene" within the meaning and application of the statute; and that the only books exempt from prosecution and trial would be those "necessarily harmless from the standpoint of public order or morality."

2—In condemning books that are "likely to bring about the corruption of public morals or other analogous injury to the public order", the Court was establishing as the criterion of criminal liability the tendency of the book. The language used by the Court shows this conclusively.

Such a criterion renders the statute an unconstitutional attack upon the liberty of the press (*Bridges* v. *California*, 314 U. S. 252, 263, 273; *Thomas* v. *Collins*, 323 U. S. 516, 530, 545; Prof. Chafee on *Free Speech in the United States*, pp. 26-27, 35). Prof. Chafee, in his book *Free Speech in the*

United States, after examining the cases on the subject, comes to the conclusion that "the most essential element of free speech is the rejection of bad tendency as the test of a criminal utterance" (p. 28), and the "we can with certitude declare that the First Amendment forbids the punishment of words merely for their injurious tendencies" (p. 35).

Parenthetically—as regards writings that incite to crime, there is no need for a new statute, because the ordinary standards of criminal solicitation or attempt apply.

3—The Court of Appeals' holding was that it would be criminal under the statute to publish any book that "the continuing and changeable experience of the community" [3] thought would be "likely to bring about the corruption of public morals or other analogous injury to the public order", unless that same "continuing and changeable experience" thought "the appearances * * * to be necessarily harmless from the standpoint of public order or morality." [4]

The phrases—"the continuing and changeable experience of the community"—books "likely to bring about the corruption of public morals" [5]—books likely to bring about "other analogous injury to the public order" [5]—and the

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3 The Court did not state how this "experience of the community" would show itself, especially in so controversial a subject as this, involving a completely subjective estimate as to whether a certain book would be "likely to bring about the corruption of public morals or other analogous injury to the public order." Evidently, the "experience" would be expressed by the particular trier of the facts in the individual case before it, whether judge or jury. Another problem poses itself in connection with this. Would their finding be subject to review on appeal? The importance of this question will appear shortly hereafter in this brief.

4 It should be noted that the Court speaks of public morals *or* public order, and again, of public order *or* morality—each time in the disjunctive—showing its intention to hold each, separately and independently of the other, protected by the statute.

5 The Court of Appeals put in the disjunctive these two different effects

fact that the Court held that each case would involve a question of fact unless "the appearances are thought to be necessarily harmless" [6] (R. 47)—make the statute "so vague and indefinite as to permit punishment of the fair use of freedom of speech." [7] There is no recognizable standard or dividing line between the criminal and the lawful. Under the Court of Appeals' construction, it becomes, in effect, a statute that makes punishable any book "detrimental to the public interest when (harmful) in the estimation of the court and jury."[8] Such a "standard that is so vague and indefinite as to be really no rule or standard at all" is invalid.[9] The statute, so construed, becomes a "dragnet which may enmesh anyone" (*Herndon* v. *Lowry*, 301 U. S. 242, 263). The applicability of the statute, and the consequent criminality of a publisher or storekeeper selling books would be left to conjecture and speculation.[10] The Court of Appeals' construction "blankets with uncertainty what might be written. A sharp line cannot be drawn surely or securely. The effort to observe it could not be free speech, free press." [11] Publishers and storekeepers would run a risk as to each new book falling within the general subject matter or within any one of the classes enumerated in the statute. Each new book and each new case would require the draw-

6 Even the meaning of this phrase is not clear.

7 Chief Judge Lehman's dissenting opinion (R. 48).

8 *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 89.

9 *Champlain Refining Co.* v. *Commission*, 286 U. S. 210, 243; *Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233, 239.

10 "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids" (*Lanzetta* v. *New Jersey*, 306 U. S. 451, 453).

11 *Thomas* v. *Collins*, 323 U. S. 516, 535.

ing of a new line. To hold a prison sentence before a publisher, or bookseller, and to call him free to publish, or sell, is patently ridiculous. The mere threat of the statute and the uncertainty of its applicability, would be an effective deterrent on freedom of the press, even as to rights properly exercised. The fear of prosecution, the expense of defense, the ignominy of being termed a criminal, would discourage the publication, or sale, of books in that general field, and thus would accomplish an effectual repression of a free press in this field of writing. A storekeeper selling books at retail is given no measurable standard by which he could judge whether any book in that field would be held legal or criminal. He would be compelled to risk jail as to each new book, since, under the Court of Appeals' construction, it would be a question of fact in each case, so that he could not know how he stood until the jury rendered its verdict. He would therefore be impelled, through fear, not to sell any book in that field, even though he sincerely believed certain books to be proper. A retailer is in a particularly vulnerable position. The expense of defense would eat up his small profits from the sale of any particular book, so that practical considerations would compel him to give up his constitutional rights without a fight, even though he was in the right. Private censors know this, and act on it. Freedom of the press might be destroyed by their nibbling at the retailer, rather than attacking publishers who might fight back.

Not only would "the continuing and changeable experience of the community" [12] be different in the community at different times, but it would be different in different parts of the community (New York State) at the same time. We

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12 By the community the Court of Appeals must have meant the State of New York, since the statute is a State statute applicable in all parts of the State.

all know that there are different standards and different concepts in the different parts of the state—rural, urban, metropolitan. We know that this is so even in the same local part of the state, the same town or city. This is a highly controversial and subjective matter. Whether a storekeeper selling a book would be branded a criminal would not depend on any test ascertainable to him or to any other citizen, whether of average intelligence or even though endowed with a super-intellect. Let us see what this could lead to:

Bookseller Jones in New York City sells a book, confident that no judge or jury in that city would condemn the book. A person who makes it his business (unofficial, and with no public standing) to censor what the public may read, knows this, and so does nothing about that book in New York City. But, he also knows that a conviction may be obtained in another part of the State. So, he proceeds to that other part of the State; lodges a complaint against a bookseller there; and a conviction follows. Does this mean that the sale of that book is criminal throughout the State, even in localities where the "experience of the community" would exonerate it; or that it is criminal only in the particular locality where the conviction was had? It must be remembered that the statute is a State statute and applies to the whole State. Suppose that censor were then to lodge a complaint against Jones in New York City, based on the same book on which a conviction had already been obtained elsewhere. The conviction of the other bookseller in the other part of the State can't deprive Jones of his right to have a New York City jury pass upon the book. This is a criminal charge, and Jones sold his book in a part of the community where the "experience of the community" would exonerate him. It may even be that the charge against him might be based on a sale made by him before the conviction

was obtained in the other case. A criminal statute is broken or observed when the act charged is committed. An acquittal of Jones[13] leaves the book—where? Is it criminal or legal to sell it in New York State? Is it criminal in the locality where the conviction was had, and legal in the locality where there was an acquittal? What is its status in other parts of the State? There would be no way of telling except after a prosecution and trial in each individual locality. The result would be chaos.

The very least that would follow would be a jockeying as to the venue of criminal prosecutions on the same book between private censors and prosecutors on the one hand and publishers on the other. The power and resources of private censors should not be underestimated. It would bring the law into great disrepute. And all because, as the Court of Appeals has held, a jury's verdict (except as to books "necessarily harmless") would be the only way to tell whether the statute has or has not been violated. The constitutional guaranty of a free press cannot be allowed to rest upon a support so equivocal. It is not an ordinary right that is involved. Because of "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment," "that priority gives these liberties a sanctity and a sanction not permitting dubious intrusions" (*Thomas* v. *Collins*, 323 U. S. 516, 529, 537). When, as here, there is a legislative invasion of the civil liberties protected by the First Amendment, there is no presumption of the constitutionality of the statute (*United States* v.

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13 It makes no difference whether he sold the book before or after the conviction of the other bookseller. He still has a right to a trial before the trier of the facts, judge or jury, in New York City, where he sold his book, before he can be found guilty. Or, are we to say that every prosecution after the conviction of the other bookseller must be held in the same locality and before the same trier of the facts as in that prior case?

Carolene Products, 304 U. S. 144, 152; *Hague* v. *C. I. O.*, 307 U. S. 496). In fact, the burden of sustaining the statute would appear to be on the State. Since "the power of a state to abridge freedom of speech * * * is the exception rather than the rule" (*Herndon* v. *Lowry*, 301 U. S. 242, 258), and "any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger" [14] (*Thomas* v. *Collins*, 323 U. S. 516, 530), it follows that the burden is on the State to show why the exception should be allowed in any given case (*Thornhill* v. *Alabama*, 310 U. S. 88, 96).

When appellant pointed out to the Court of Appeals that under this statute the "publication of any crime book or magazine would be hazardous," the Court said that it believed "this assertion to be an exaggeration; but the point is of little account in any event, since 'the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree' (*Nash* v. *United States*, 229 U. S. 373, 377)." In addition to the *Nash* case, which involved the Federal Anti-Trust Act, the Court cited *Dixon* v. *New York Trap Rock Corp.*, 293 N. Y. 509, a nuisance action [15] (R. 47). Two

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14 None of the state courts found that there was a clear and present danger: none of them discussed that.

15 In support of this position of the Court, appellee, at page 9 of its brief in this Court, cites as additional authorities *Rosen* v. *United States*, 161 U. S. 29; *Fox* v. *Washington*, 236 U. S. 273; *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497; *United States* v. *Kagen*, 314 U. S. 513; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568. None of these cases is applicable to, or controlling on the instant case, for the following reasons. The *Rosen* case was decided on the "tendency" of the writing—this doctrine has since been repudiated (*Bridges* v. *California*, 314 U. S. 252, 273; *Thomas* v. *Collins*, 323 U. S. 516, 530, 545; Prof. Chafee's *Free Speech in the United States*, pp. 26-27, 35). The *Fox* case concerned a statute that was expressly directed against writings inciting the commission of crime, breach of the peace or act of violence. The *Hygrade Provision Co.* case involved fraud in the sale of non-kosher meat as kosher meat. The *Kagen* case was an evasion of income

things stand out in this statement of the Court of Appeals. First—it did not say that there was no hazard: it merely called the hazard to publication an exaggeration. Second—it overlooked the fact that the risk entailed in its indefinite construction, with no definite standard, makes the exercise of the right hazardous. The manner of operations of private censors adds to this hazard.

In saying that such a hazard is "of little account," and in citing in support of that statement an Anti-Trust Act case and a nuisance case, the Court of Appeals completely overlooked the fact that freedom of the press, protected by the First and Fourteenth Amendments to the Constitution, is not an ordinary right, to be treated as an ordinary right. The Court of Appeals was granting to the *malum prohibitum* created by this statute priority over the Constitutional guaranty of a free press, as though the latter were on a lower (or, at the most, on an equal) plane with the former. Where there must be a weighing of conflicting interests, the First and Fourteenth Amendments give binding force to the principle that freedom of the press should be granted priority.

In the concluding paragraph of its opinion, the Court of Appeals stated that "the defendant lastly argues for a fresh conception of freedom of the press under which the heretofore accepted requirements of decency would no longer be operative against obscene publications." I will set forth in full that portion of my brief in the Court of Appeals to which that Court was referring, so that this Court may see what the Court of Appeals called "a fresh conception of freedom of the press."

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tax case. The *Chaplinsky* case involved "a statute narrowly drawn and limited to define and punish specific conduct lying within the domain of state power, the use in a public place of words likely to cause a breach of the peace" (315 U. S., p. 573).

"Even accepting *arguendo* the Appellate Division's version of the statute, that it is aimed exclusively at printed matter which tends to demoralize the minds of its more impressionable readers, the statute still would be unconstitutional. Such a tendency is not sufficient to justify repression of the constitutional guaranties of freedom of the press.

"In the *Bridges* case,[16] it was held, at page 173, that 'neither "inherent tendency" nor "reasonable tendency" is enough to justify a restriction of free expression.'

It should be borne in mind (1) that during the 60 years subdivision 2 has been on the books, it has never been enforced, and (2) that magazines such as are involved in this case have been published and sold freely and openly during that period, and still are, for that matter.

To make the test of the illegality of a book about crimes its tendency to demoralize the minds of its more impressionable readers would bar all crime books. This court, in *People* v. *Muller*, 96 N. Y. 408, 411, overruled a like test suggested for subdivision 1:

> 'If the test of obscenity or indecency in a picture or statue is its capability of suggesting impure thoughts, then indeed all such representations might be considered as indecent or obscene. The presence of a woman of the purest character and of the most modest behavior and bearing may suggest to a prurient imagination images of lust, and excite impure desires, and so may a picture or statue not in fact indecent or obscene.'

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16 *Bridges* v. *California*, 316 U. S. 252, 273.

> There is no way of anticipating the effect of any book on crimes, no matter how the subject may be treated, upon a more impressionable reader. Such a criterion is wrong. In any event, the statute itself, as enacted by the legislature, does not establish any such criterion."

The balance of my brief in the Court of Appeals was devoted to distinguishing the cases cited in the Appellate Division's opinion.

In the course of its opinion, the Court of Appeals said, as though it were a factor having a bearing on its decision, that "It is not suggested that any of the contributors [to the magazines in this case] was distinguished by his place in the literary world or by the quality of his style" (R. 46). Any discrimination in the application of the statute based on such a distinction should be rejected as unworthy, as well as unconstitutional because not affording all writers equal protection of the law. Just as it has been held that the right of free press is not confined to any field of human interest,[17] so it should be held that the right of free press is not confined to eminent writers or to writings of quality.

Nowhere in its opinion did the Court of Appeals consider whether there was a clear and present danger justifying the statute. Appellant has shown, at pages 21 to 23 of his original brief in this Court, that the clear and present danger principle and its application to the instant case demonstrate the unconstitutionality of the statute. To avoid repetition, this Court is respectfully referred to appellant's original brief on that point.

The statute itself provides (and the Court of Appeals' construction has not changed it in that respect) that it is directed against publications "principally made up of" the

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17 *Thomas* v. *Collins*, 323 U. S. 516.

described writings. The quantitative factor—"principally" *versus* single or multiple features—in disregard of the qualitative element that would enter into the question of whether any specific publication has the effect the court seeks to guard against, constitutes an unreasonable classification, and does not afford equal protection of the law. Under such a statute, a 60 page book wholly made up of such stories, would be a violation of the statute, but a 400 page book of which 150 pages contained such stories (they might even include all the stories of the former (60 page) book, and more, to make up the 150 pages of such stories) would not be a violation of the statute. This is not fanciful reasoning. The statute itself allows such a result because that is the way it is worded. Under this statute, a single terribly vicious and harmful story, or even several such, would not be a violation, where such story or stories were a small part of a larger magazine or book, whereas a number of milder stories would be a violation if they constituted the principal contents of a magazine or book. Harmful effect, assuming *pro arguendo* that it could follow such reading, could as easily follow reading the former as the latter. The entire nub of the question is ignored and disregarded by such a statute. This is not a statute " 'narrowly drawn to cover the precise situation' that calls for remedial action": it is not regulation: it is prohibition (*Martin* v. *Struthers*, 319 U. S. 141, 151).

No matter how much we may dislike the particular magazines involved in this case, and no matter how lofty may be the ideals of those who would suppress them, a Constitutional right is at stake here, and it should be safeguarded by all who have sworn to uphold the Constitution. Bad taste does not render the magazines outlaw. Lofty ideals should not be permitted to whittle away our Bill of Rights.

This is especially necessary in a case like this. Where writings meet general approval, no effort to maintain them would be needed.

If it be argued by appellee that some part of what has been said herein about subsection 2 (the statute involved in this case) might be said about subsection 1 (the obscenity statute, not involved in this case), the answer is that our national policy, as manifested by the constitutional guaranty of a free press contained in the Federal Constitution and in the Constitutions of every State of the Union, and the totality of objections to subsection 2, as set forth above, and the absence of limitation on subsection 2 by judicial definition, enjoin an additional restriction on the freedom of the press.

POINT II

In answer to this Court's question:

> **"2. In view of such construction, assuming the answer to the first question is in the affirmative, was the conviction herein compatible with the Fourteenth Amendment, considering the state of the law to have been what it was at the time that the acts were committed for which the conviction was had?"**

it is appellant's contention that because (a) the statute, as construed by the Court of Appeals, was "designed exclusively to outlaw 'vehicles for inciting violent and depraved crimes against the person,'" [18] and (b) the conviction herein was not based on such a statute, but on a different construction of the statute under which the statute clearly and undoubtedly constituted an unconstitutional repression of a free press, and (c) appellee was never given an opportunity to defend himself under the statute as construed by the Court of Appeals; that therefore the conviction herein and the affirmance of *that* conviction by the Court of Appeals on *its* construction violate the Fourteenth Amendment's guaranty of (1) a free press and (2) due process.

(a) The proceedings in the state courts, and (b) the way in which the Court of Appeals' construction of the statute came into being, and (c) the application of the statute as so construed to appellant, (1) deprived him of a full hear-

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18 I am accepting (*pro arguendo* only), for the purpose of this Point, the appellee's statement as to what the Court of Appeals' construction made the statute (appellee's original brief in this Court, pp. 7-8. See also, to the same effect, pp. 5, 6 and 10 of the same brief).

ing and of his defenses under the statute; (2) deprived him of due process; and (3) in practical effect and operation made the statute construed in this manner an *ex post facto* law with respect to the appellant.[19]

Winters was never, not even in the Court of Appeals, confronted with, or charged with violating, or tried under, or given a chance to defend himself against, or convicted of violating a statute such as the Court of Appeals finally[20] declared it to be.[21]

On August 10, 1942, Winters was arrested when an agent of the New York Society for the Suppression of Vice found in his store on that day a number of copies of the magazines in this case (R. 6-7).

On December 2, 1942, the District Attorney of New York County filed an information against Winters in the Court of Special Sessions of the City of New York. The information contained five counts. The first three charged a violation of subsection 1 of section 1141[22] (R. 2-3), and may be disregarded because Winters was acquitted on those counts (R. 5). Counts 4 and 5 (on which Winters was convicted) charged a violation of subsection 2 of Section 1141. These two counts are identical, except that each concerns a different issue of the magazine. They charged that the law was violated in that the magazines were "devoted to the publication and principally made up of criminal news, police reports, and accounts of criminal deeds, and pictures and

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19 That the statute as construed by the Court of Appeals does not apply to the magazines appellant had in his store is discussed in Point III *infra*.

20 This was 2½ years after Winters was tried and convicted, and 6 months after the appeal was argued in the Court of Appeals.

21 See subdivision (a) of this Point's heading, on page 19, *supra*, and note 18, on page 19, *supra*.

22 Subsection 1 banned "obscene, lewd, lascivious, filthy, indecent or disgusting" books, magazines, and other writings.

stories of deeds of bloodshed, lust and crime" (R. 4). They charged every classification enumerated in the statute, and practically in the language of the statute as it was written by the legislature.[23]

On January 19, 1943, Winters was tried in the Court of Special Sessions of the City of New York. That court acquitted him on the first three counts, and convicted him on the ground that the magazines were composed of "lurid, crazy material"; "the manner in which—is treated and handled and set up in the magazine—the typography, and the language used to depict these crimes—that we feel brings it within the prohibition of subdivision 2" (R. 24).

On January 27, 1943, judgment of conviction was pronounced on Winters by the Court of Special Sessions (R. 5). All that the Court said at that time was, "Well, we think that the magazine comes within the subdivision—within the prohibition of the subdivision. Whether or not it is constitutional is another matter" (R. 33). The Court did not pass on that constitutionality.

It will be noted at this point that nowhere in the statute itself, or in the information filed by the District Attorney against Winters, or in the holding of the Court of Special

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23 The part of counts 4 and 5 which refers to the magazines as "obscene, lewd, lascivious, filthy, indecent and disgusting" should be disregarded as surplusage. That is the language used in subsection 1 of section 1141; and the pleader used it in the first three counts of the information which charged a violation of subsection 1. Although the pleader also used these words in counts 4 and 5, it is conceded that these counts have not been brought under subsection 1, but under subsection 2 which has no reference whatever to these words. Subsection 2 is not concerned with "obscene, lewd, lascivious, filthy, indecent and disgusting" writings, but with writings made up of "criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime." And, this last is the language used by the pleader in describing with particularity in the information (as required by the law in New York) the contents of the magazines herein. Furthermore, the Court of Appeals expressly repudiated any construction of subsection 2 which would make it in any manner a "reduplication of subdivision 1" (R. 45).

Sessions, was there any hint that the statute was a statute such as the Court of Appeals eventually held it to be.

On February 24, 1943, Winters appealed from the conviction (this is the only conviction in this case) to the Appellate Division of the Supreme Court of the State of New York (R. 1-2). In that court, the appellee, The People of the State of New York, in their brief in support of the conviction, clearly and unmistakably stated what they understood the statute to mean, and the ground on which they understood Special Sessions to have based the conviction. At page 2 of their brief, they said that the magazines, "purporting to be a compilation of reports from police records and files, presents, in vivid and exciting fashion, narrations focusing about crimes of bloody violence and lust. As a consequence, he [Winters] was tried and convicted of violating section 1141, subdivision 2 of the Penal Law, which stamps as criminal the possession, with intent to sell, of this sort of literature."

In support of the argument

> **"A. The magazines were objectionable within the meaning of the applicable statute."**

appellee said, at page 6 of their brief,

> "It [subsection 2] is aimed solely at publications which, for the purpose of exciting attention and commanding circulation, present in vivid and striking fashion tales of bloodshed, crime, and lust; and which as a result of their flaming and expressive portrayals, tend to influence and demoralize the minds of their more impressionable readers."

This was the entire gist of the People's argument in the Appellate Division as to (1) what the statute meant, and

(2) the ground on which Special Sessions had convicted Winters, and (3) the description of the contents of the magazines alleged to violate the statute.

On May 19, 1944, the Appellate Division affirmed the conviction (R. 36-37). It rendered an opinion in which it adopted the construction of the statute and the description of the magazines urged by the People. In its opinion it referred to the "magazines which purported to contain true cases of crimes from police records and files" (R. 37); stated that

> "They contain a collection of crime stories which portray in vivid fashion tales of vice, murder and intrigue. The stores are embellished with pictures of fiendish and gruesome crimes, and are besprinkled with lurid photographs of victims and perpetrators." (R. 38);

and held:

> "That such publications tend to demoralize the minds of their more impressionable readers cannot be doubted. The statute which is aimed at restraining the publication and sale of such printed matter, we think, is a legitimate exercise of the police power of the state in that it is designed to promote the general welfare and to protect the morals of the community" (R. 38).

Further on in its opinion, the Appellate Division held:

> "It [subsection 2] is aimed exclusively at printed matter which presents tales of bloodshed, crime or lust in a manner which *would have a tendency* to demoralize its readers and *would be likely* to corrupt the morals of the young and lead them to immoral acts" (emphasis mine) (R. 39).

The Appellate Division, in support of its above holdings, cited and quoted from the case of *People* v. *Gitlow*, 234 N. Y. 132, 137, affirmed *Gitlow* v. *New York*, 268 U. S. 652 that part of the opinion of the Court of Appeals which sustained the right of the legislature to enact a statute abridging the freedom of the press on the ground of a bad tendency of the writing (234 N. Y. 132, 137). In so doing, the Appellate Division overlooked the fact that this court, in *Bridges* v. *California*, 314 U. S. 252, 263, 273, has overruled that doctrine.

It will be noted at this point that nowhere in the Appellate Division was Winters called upon to meet and defend himself against a statute such as the Court of Appeals eventually declared it to be. Nor was the Appellate Division acting under such a statute when it sustained his conviction.

There can be no doubt as to the unconstitutionality of the statute construed as it was by the Appellate Division. This has been gone into at length in appellant's original brief, and in Point I of this brief. It was this construction that appellant addressed himself to, in the Court of Appeals; and argued as being unconstitutional; and it was this construction that the appellee argued to sustain.

The People's brief in the Court of Appeals stated that defendant was found in possession of "magazines presenting in vivid and exciting fashion, tales of vice, murder, and intrigue. The immoralities forming the subject matter of the stories are sketched in intimate detail. In addition, sensational photographs of victims and perpetrators of fiendish murders and other acts of immorality and depravity embellish the pages" (p. 2). The People then stated that

> "As a consequence [of possessing such magazines], the defendant was convicted of violating subdivision 2 of section 1141 of the Penal Law, which condemns the

possession, with intent to sell, of printed matter 'devoted to * * * and principally made up of' tales of bloodshed, lust and crime" (p. 2).

The argument of the People in the Court of Appeals was:

"A. The Appellate Division properly construed the provision in question" (p. 4).

and

"B. The statute, as so construed, is valid and constitutional" (p. 8).

In support of their above argument *A*, the People stated, at page 4 of their Court of Appeals brief:

"An examination of section 1141 of the Penal Law, in its entirety, establishes that *subdivision 2* thereof *was intended to condemn,* precisely as noted by the Appellate Division (*supra,* p. 3), *only such printed matter which presents tales of crime 'in a manner that would have a tendency* to demoralize its readers *and would be likely* to corrupt the morals of the young and lead them to immoral acts," (emphasis mine).[24]

and at page 5:

"It is reasonable to assume, therefore, that, in enacting subdivision 2, the legislature intended to condemn only such crime literature which, like its obscene and indecent counterparts, *tends 'to deprave or corrupt those whose minds are open to' the immoralities suggested*" (emphasis mine).[24]

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24 See footnote 8 at pages 6 to 7 of appellant's original brief, and Point I of this brief; showing the unconstitutionality of such a test of criminal liability.

and at page 7, that "the legislation does not seek to suppress all publications dealing with scandals and immoral conduct but simply those presenting items of that nature in a concentrated fashion and with such detail that a tainting of the social atmosphere and an impairment of the morals of the young would be likely to ensue."

In support of their above argument *B*, the People stated, at page 8 of their brief:

> "As we have shown, subdivision 2 of section 1141 aims exclusively at printed matter which presents crime stories in a manner calculated to impair public morals. That being the case, its validity is unquestionable."

At page 10 of their brief, the People described the magazines as "of such a nature that their tendency 'to demoralize the minds of their more impressionable readers' cannot be doubted."

It was to this argument, outlined above, that appellant adressed himself in the Court of Appeals. There can be no question that such a statute, so construed, is unconstitutional. Appellant has shown this in his original brief, and in Point I of this brief.

The appeal was argued in the Court of Appeals in January, 1945. That Court delivered its opinion on July 19, 1945 (R. 44). Then, for the first time, was the statute held to be "designed exclusively to outlaw 'vehicles for inciting violent and depraved crimes against the person' (R. 46)." [Appellant is here accepting, *pro arguendo* only, the description given by the appellee to the Court of Appeals' construction of the statute (appellee's original brief in this Court, pp. 7-8)]. But, Winters had never been charged with violating *such* a statute. He had not been tried under *such* a statute. Most particularly, he had not been convicted by

Special Sessions of violating *such* a statute. He had never been given an opportunity to require proof against him, and to defend himself under such a statute—neither in the information against him, nor on his trial, nor on any of his appeals, not even in the Court of Appeals. Winters' reliance on the wording of the statute, and the wording of the information charging him with what the People alleged constituted the crime, and the construction given the statute on his trial, dictated his defense. The construction of the statute he was confronted with in the Appellate Division and in the Court of Appeals dictated his defense in those courts. The charge in the information, the line of argument by the People in all the State courts, the construction by Special Sessions and by the Appellate Division, and Winters' consequent line of defense, became a trap as a result of the ultimate change of construction by the Court of Appeals. Surely, he had a right to rely on what preceded that ultimate construction. He was entitled to know the specific charge against him, and to defend himself against *that* charge. He was not compelled to anticipate the innumerable possible constructions that *might* be placed on the statute, including the one eventually given by the Court of Appeals. There was a charge against him. That one he met and overcame.

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."
>
> *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453.

I don't think it can be disputed that the statute, as the legislature actually wrote it, and as it actually read before the Court of Appeals' construction came into existence, and

as anybody, reading it, would understand it before the Court of Appeals construed it, that such a statute was unconstitutional as being too broad, general, all-inclusive, and as improperly abridging freedom of the press. It was the statute read this way that Winters was charged, by the information, on December 2, 1942, with violating (R. 4).

Nor can it be disputed that the conviction of Winters by the court which convicted him, and which was the only court in this case which had the power to convict him, *i.e.*, Special Sessions, the court in which he was tried, and which was the only trier of the facts in the entire history of this case, that the conviction in that court, in January, 1943, was based on an unconstitutional construction of the statute. It was then, in January, 1943, and on that statute, construed and understood that way, that Winters was convicted by the Court of Special Sessions. The invalidity of that conviction by that court was established then and there. What followed could not undo what had been done. What followed could not validly act *nunc pro tunc*. The practical effect of what followed was in the nature of an *ex post facto* enactment and ruling. The Court of Appeals sustained *that* conviction, unconstitutional when rendered, by bringing into being, 2½ years after Winters had been charged, tried, and convicted, a new and different construction of the statute. This deprived Winters of his right to a trial on the ground and charge on which the conviction is now sought to be sustained. It did away with the requirement before the trial court, the triers of the facts, of essential elements of the crime so enunciated by the Court of Appeals, *e.g.*, whether such a statute was justified by a clear and present danger, and whether the magazines in this case came within the statute so construed by the Court of Appeals. It deprived Winters of a hearing thereon, and of an opportunity to be heard in his defense thereon before

the court which tried him, or before any court, including the Court of Appeals. It operated on past acts of Winters, and on the past charge against him, and on his past trial, and on his past conviction. It ignored his right to be charged, and to be tried, and to be heard in his defense on the statute as thus construed. He was given no chance to meet, and to defend himself against such a construction; or to be heard that there was no clear and present danger that would justify such a statute, so construed;[25] or to be heard that the magazines did not come within the statute so construed. He was deprived of any chance whatever to be heard on his behalf on these points in any court, including the Court of Appeals. And all this was done to sustain and prefer a *malum prohibitum* over the Constitutional guaranties of a free press and due process.

Such a procedure also ignored Winters' rights arising out of his having been charged, tried, and convicted under the statute as it read and was understood at the time he was charged, tried, and convicted.

Appellee's present argument, in effect, is that the decision and construction of the Court of Appeals in July, 1945 validated the illegal conviction of Winters rendered in January, 1943.

This should not be permitted. It would be a most dangerous principle to say that due process exists where a conviction, illegal at the time rendered, becomes valid as the result of a subsequent construction of the statute so arrived at. The practical working effect of such a procedure is most certainly *ex post facto* in fact and in effect, if not

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25 The Court of Appeals' opinion shows that it never even considered this factor. Not having anticipated such a construction (nobody, including the People, anticipated it: this is shown by their briefs and arguments in the State courts), Winters was deprived of his chance to raise, and to be heard on this point.

in name. Under such circumstances, any statute relating to restriction of the press, no matter how invalid on its face, would act as a previous restraint in working effect. A free press would not exist under such circumstances; there would always be the danger of some subsequent strained construction, depriving the writer, publisher, or seller of any chance to be heard in his defense.

The change of the charge against Winters, and the change of the theory of prosecution (2 1/2 years after the conviction, and long after he had been heard in his defense on the original charge), by means of the Court of Appeals' construction, was a change of law as thoroughly and as effectively as though by legislative enactment or amendment under similar circumstances.

These conclusions, founded on reason and justice, find support in adjudications of this Court. This Court has held that

> "in passing upon constitutional questions the court has regard to substance and not to form" (*Near* v. *Minnesota*, 283 U. S. 697, 708);

that

> "The question whether a state law deprives a party of rights secured by the Federal Constitution depends not upon how it is characterized, but upon its practical operation and effect" (*Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 237);

that

> "Our concern is with realities, not nomenclature" (*Senior* v. *Braden*, 295 U. S. 422, 429);

that this Court, in deciding whether Winters was deprived of due process, may examine the entire history of this case (*Fiske* v. *Kansas*, 274 U. S. 380), and must determine the justice or injustice of what happened in the light of the whole record (*Snyder* v. *Massachusetts*, 291 U. S. 97, 114, 115);

that this Court is "free to inquire whether the Statute as *interpreted and applied* by the State Court denies rights guaranteed by the Constitution" (emphasis mine) (*North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, 282);

and that

> "the controlling test is to be found in the operation and effect of the law *as applied and enforced* by the State" (emphasis mine) (*St. Louis S. W. Ry.* v. *Arkansas*, 235 U. S. 350, 362).

(a) Accepting the Court of Appeals' construction of the statute, and (b) assuming the statute so construed to be a valid exercise of the police power; when we consider (1) that Winters was not tried and convicted under that construction, but under a totally different construction, and (2) the manner in which, and time when the Court of Appeals' construction was arrived at, and (3) that the practical effect of the *Court of Appeals applying and enforcing that construction* in this case, at the time it did, operated to deprive Winters of an opportunity to meet that construction and to defend himself thereunder; the conclusion is compelling that Winters was arbitrarily deprived of his right to due process under the Fourteenth Amendment.

> *Abie State Bank* v. *Bryan*, 282 U. S. 765, 772;
> *Snyder* v. *Massachusetts*, 291 U. S. 97, 114, 115;
> *Poindexter* v. *Greenhow*, 114 U. S. 270, 295.

The *Snyder* case also held, at page 116:

> "A defendant who has been denied an opportunity to be heard in his defense has lost something indispensable, *however convincing the ex parte showing.*" (emphasis mine.)

Particularly applicable to the instant case is this Court's holding in *Chicago, Burlington and Quincy R.R. Co.* v. *Chicago,* 166 U. S. 226, at pp. 234-235:

> "But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it may be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form. This court, referring to the Fourteenth Amendment, has said: 'Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation.' *Davidson* v. *New Orleans,* 96 U. S. 97, 102. The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law."[26]

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26 All State agencies, including the judiciary, are forbidden to take any action that would impair due process. *Ex parte Virginia,* 100 U. S. 339.

It should always be borne in mind that

> "while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation"; that "a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles" (*Euclid* v. *Amber Co.*, 272 U. S. 386, 387).

Due regard must be had to the nature of the proceedings (criminal, based on a *malum prohibitum*), and to the character of the rights affected (the constitutional guaranties of a free press and of due process).

POINT III

In answer to this Court's questions:

"3. In view of the construction herein given by the Court of Appeals to subsection 2 of section 1141 of the New York Penal Code, what was the law, binding upon this Court, which governed the acts for which the conviction herein was had? Was the conviction under such controlling law, as applied to this defendant at that time, compatible with the Fourteenth Amendment?"

appellant contends that:

A. The law, binding upon this Court, which governed the acts for which the conviction herein was had, is the law as it was when those acts were committed.

B. The conviction under such controlling law, as applied to this defendant at that time, was not compatible with the Fourteenth Amendment.

C. It makes no difference what law is binding on this Court, whether it be (1) the statute itself as it read when Winters was arrested and the information against him filed, or (2) the statute as construed by the Court of Special Sessions in convicting Winters under the statute so construed, or (3) the statute as construed by the Appellate Division in affirming that conviction, or (4) the statute as construed by the Court of Appeals in affirming that conviction. In each instance, the conviction under such controlling law, whichever it was, as applied to this defendant at that time, was not compatible with the Fourteenth Amendment.

A

Present day standards of justice, the requirements of the due process clause, and adjudications of this Court compel the conclusion that the law, binding upon this Court, which governed the acts for which the defendant was convicted, is the law as it was when those acts were committed. That is the law under which the defendant was arrested, tried and convicted. That is the law with which he was confronted, and against which he defended himself.

To say that this Court is bound by the law as construed by the Court of Appeals—a construction that did not come into existence until years after Winters had been arrested, tried and convicted—a construction under which he had not been tried or convicted—a construction so different from the law as it was when he was arrested, that nobody, not even the People of the State of New York, ever considered it—such a decision would be diametrically opposed to the actual facts, and would be so unfair and unjust as to shock the conscience. It would give the Court of Appeals' construction a retroactive effect. It would of necessity be based, not on fact, but, on a legal fiction, *i.e.*, that in 1884 the statute was written, not as the legislature actually wrote it, but, as the Court of Appeals construed it in 1945.[27] As has been shown in Point II, *supra*, the practical effect of such a decision would be to deprive the defendant of an opportunity to defend himself on the ground on which his conviction was founded by the appellate court.

This Court should not permit a legal fiction to be accorded greater veneration than, and to prevail over the

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27 The People, in note 2 on page 6 of their original brief in this Court, have argued for such a rule. Their argument, and the cases cited by them, will be answered shortly hereafter.

constitutional guaranties of due process and freedom of the press.

Such a legal fiction would nullify this Court's holding that

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."

Lanzetta v. *New Jersey*, 306 U. S. 451, 453.

In contravention of this Court's holdings in *Near* v. *Minnesota*, 283 U. S. 697, 708, *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 237, *St. Louis S. W. Ry.* v. *Arkansas*, 235 U. S. 350, 352, *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, 282, *Chicago, etc., R. Co.* v. *Chicago*, 166 U. S. 226, 234-235, such a decision would accord to form greater regard than to substance, and would ignore the practical operation and effect of the Court of Appeals' construction as applied and enforced in this case.

This Court could not completely perform its duty to enforce the constitutional guaranties of free press and due process if it considered itself bound by a legal fiction. In deciding a case such as this, this Court is not compelled to accept, without inquiry, the conclusion of the State Court.

Appleby v. *City of New York*, 271 U. S. 364, 380.

The principle established by a contrary decision would sustain convictions obtained in this manner under other *malum prohibitum* penal statutes, and affirmed in this manner by subsequent constructions in appellate courts, even though such statutes clearly and explicitly said one thing and the much later "construction" said something entirely

different. Such "constructions" could, and would act exactly like *ex post facto* legislative enactments. And yet, if the rule propounded by the appellee were to be enforced, this Court could do nothing about convictions obtained in this manner, despite the due process clause. This can not be. It must not be. The due process clause gives this Court the power and the duty to prevent it.

This Court, on previous occasions, has expressed itself on the point here involved.

In *Superior Water Co.* v. *Superior*, 263 U. S. 125, the facts were as follow:

In 1889, plaintiff's predecessor obtained certain contract rights from defendant's predecessor, under a municipal ordinance enacted by the latter.

In 1917, the latter, in pursuance of a law passed by the State legislature in 1911, took steps to deny its contractual obligation and to condemn the property involved.

The Supreme Court of Wisconsin, when the case came before it some time later, construed a reserved power clause of the Wisconsin Constitution, that had been in effect since 1848, and under which plaintiff's predecessor had been incorporated, as giving the legislature the power to modify the contract. It further held that the legislature, by the Act of 1911, had modified the contract in accordance with the provisions of that reserved power clause of the Wisconsin Constitution under which plaintiff's predecessor had been incorporated.

The case then came to this Court, which held that because of the contract clause of the Constitution, the construction given the reserved power clause by the State Court could not have a retroactive effect; that, in considering what the reserved power clause meant in 1889, when the contract rights were obtained, this Court was not bound by the

State Court's construction made thereafter. This Court said:

> "None of the decisions of the Supreme Court of Wisconsin prior to 1889 to which we have been referred construes the reservation in the State Constitution as having the extraordinary scope accorded to it below; and certainly in the absence of some clear and definite pronouncement we cannot accept the view that it then had the meaning now attributed to it"[28] (263 U. S., at p. 136).

In *Gelpcke* v. *City of Dubuque*, 68 U. S. (1 Wall.) 175, this Court held, at page 206:

> "However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past. 'The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision of its courts altering the construction of the law.'
>
> "The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law. To this rule, thus enlarged,

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28 At the time Winters was arrested and convicted, there was no decision of any kind in any court, construing subsection 2. All anybody could go on was the language of subsection 2 itself. Appellee, in charging a violation thereof by Winters, used the very language of the subsection, in the information filed by it (R. 4).

we adhere. It is the law of this court. It rests upon the plainest principles of justice."

and, at pages 206-207:

"We are not unmindful of the importance of uniformity in the decisions of this court, and those of the highest local courts, giving constructions to the laws and constitutions of their own States. It is the settled rule of this court in such cases, to follow the decisions of the State courts. But there have been heretofore, in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases. We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice.'

Although the applicability of the *Gelpcke* case has been limited, by subsequent decisions, to appeals from Federal Courts to this Court, and it has been held inapplicable to appeals from State Courts to this Court, this is so only because of a jurisdictional ground. The *Gelpcke* case involved the contract clause of the Constitution. That clause forbids only legislative impairment of contract obligations. It does not forbid impairment by judicial decision. Consequently, where a State Court, by "construction" of a state law, impairs a contractual obligation, there is no federal question for this Court to pass upon.

Bacon v. *Texas*, 163 U. S. 207, 221, 222.

That obstacle is not present in our case. The due process clause forbids action by all state agencies, including the judiciary (*Ex parte Virginia*, 100 U. S. 339). Therefore, the

principle enunciated in the *Gelpcke* case can, and should be applied to our case.

True, the *Superior* and *Gelpcke* cases were concerned with the contract clause, whereas our case involves the due process clause. But, the due process clause is no less important and worthy than the contract clause. The principle is the same, whichever constitutional right is impaired.

Appellee's statement, in note 2 on page 6 of its original brief in this Court:

> "For the purposes of determining its constitutionality, the statute must now be read as though the very words used in the opinion of the New York Court of Appeals had been written by the legislature itself."

correctly sets forth the rule to be followed in considering and answering this Court's first question. Appellant has followed this rule in answering that question, in Point I of this brief. But, that rule does not apply to this Court's third question, answered in this Point. None of the cases cited by appellee in support of that rule involved a situation such as is present here. In none of those cases was the due process clause involved. In none of those cases was the question raised, considered, or passed upon as to whether the construction by the State Court should be given a retroactive effect. Those cases merely held that this Court cannot review and revise a construction placed by the highest State court on a State statute as to a State matter. In only two of those cases, *Knights of Pythias* v. *Meyer*, 265 U. S. 30, 32, and *Minnesota* v. *Probate Court*, 309 U. S. 270, 273, was the statement made that this Court would take the statute as though it contained the lan-

guage used by the State court in construing it. That expression apparently was used by this Court for emphasis only, since there was no question there as to due process, or as to whether or not the construction was retroactive.

Those earlier decisions cited by appellee, based on conditions radically different from those present in the instant case, do not establish that Winters had due process. The problem is to be tested by what happened in his case (*United Rys. v. West*, 280 U. S. 234, 249). While the fundamental principles of the organic law of the Nation remain unchanged, their application to changing conditions must and does call for a restatement of earlier rules.

The rule contended for by appellee, general in form, and designed for a different purpose, should not be applied to this case, since to do so would result in depriving defendant of his right to defend himself on the ground on which the conviction is sought to be sustained.

Snyder v. *Massachusetts*, 291 U. S. 97, 114, 115;
Funk v. *United States*, 290 U. S. 371, 382, 383.

B

The statute, as enacted by the state legislature, and as applied to the defendant, violated the constitutional guaranty of a free press. The defendant's conviction thereunder was in violation of that guaranty.

This is discussed at length in appellant's original brief. To avoid repetition, this Court is respectfully referred to that brief.

In fact, I don't think there can be any doubt that the statute itself, read and understood as the legislature wrote it, is so broad, general, and all-inclusive with respect to the classifica-

tions it bans, that it effects an unconstitutional repression of the press.

Consider, in the light of the various "constructions" given this statute by the state courts, the plight of the defendant, or of any other person, whether he be a layman, a lawyer, or a judge, when faced with a statute such as this. Each state court "construed" the statute differently. There were three courts, and three different constructions. A person, confronted with such a statute before it is "construed" by any court, should have a right to act on the assumption that it means what it says. What it says is in direct violation of the constitutional guaranty of a free press. What it says shows that it is void, and so, need not, and should not be obeyed. It would not be a free press if a person, faced with such a statute, were compelled to bear the burden of speculation or conjecture as to a possible change of meaning by a subsequent "construction" by some court.

Lanzetta v. *New Jersey*, 306 U. S. 451, 453;
Connally v. *General Const. Co.*, 269 U. S. 385, 391, 392-393, 395;
Thomas v. *Collins*, 323 U. S. 516, 535.

C

There can be only one law, binding upon this Court, which governed the acts for which the conviction herein was had, whether it be the statute as the legislature actually wrote it, or Special Sessions' construction thereof, or the Appellate Division's construction, or the Court of Appeals' construction. The law, binding upon this Court, which governed the acts for which the conviction herein was had, cannot be construed one way in considering the question of due process,

and another way in considering the question of the freedom of the press.

The question is whether that controlling law is the statute (a) as the legislature actually wrote it, or (b) as the Court of Appeals construed it. (Special Sessions' construction[29] and the Appellate Division's construction[30] have been superseded by the Court of Appeals' construction.) Whichever that controlling law is, (a) or (b), the conviction herein, under such controlling law, as applied to Winters, was not compatible with the Fourteenth Amendment.

(a)

If the statute means what it says as the legislature wrote it—that it bans "criminal news" and "police reports" and "accounts of criminal deeds" and "pictures, or stories of deeds of bloodshed, lust or crime"[31]—then it is so broad, general, and all-inclusive as to effect an unconstitutional repression of the press, and the conviction thereunder is

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29 Special Sessions held that the statute is addressed to "lurid, crazy material," and that the test of criminal liability is "the manner in which—is treated and handled and set up in the magazine—the typography, and the language used to depict these crimes" (R. 24). Such a test is so vague and indefinite that it "blankets with uncertainty whatever may be said." A "sharp line cannot be drawn surely or securely. The effort to observe it could not be free speech, free press."

Thomas v. *Collins*, 323 U. S. 516, 535.

30 The Appellate Division's construction, that the statute is aimed at printed matter having a bad "tendency," renders the statute an unconstitutional attack upon the press.

Bridges v. *California*, 314 U. S. 252, 263, 273;
Thomas v. *Collins*, 323 U. S. 516, 530, 545;
Prof. Chafee, *Free Speech in the United States*, pp. 26-27, 35.

31 Since the statute enumerates these classes of writings in the disjunctive, each is banned by itself, regardless of the other classes listed.

void. This is considered at length in subdivision B of this Point, *supra*, and in appellant's original brief in this Court. To avoid repetition, this Court is respectfully referred thereto.

(b)

If it is the Court of Appeals' construction which is to be considered as governing the acts for which the conviction herein was had,[32] then that construction, as applied to this defendant, deprived him of due process. He was never charged with violating such a statute. He was never convicted of violating such a statute. He was deprived of any chance to defend himself under such a statute. The facts showing this have been set forth in detail in Point II of this brief. To avoid repetition, this Court is respectfully referred to that Point.

In addition, as has been shown in Point I of this brief, the statute as construed by the Court of Appeals violates the Fourteenth Amendment's guaranty of a free press, and consequently, the conviction thereunder is void.

In addition, the judgment of conviction against defendant was a general one (R. 30, 5). It did not specify the classification within the statute upon which it rested. As there are several distinct classifications set forth in the statute, and the trial court might have convicted with respect to any one of them, independently considered, it is impossible to say under which one the conviction was had. If any one of the classifications is unconstitutional,

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32 Appellant accepts, *pro arguendo* only, appellee's statement that the Court of Appeals held that the statute is "designed exclusively to outlaw 'vehicles for inciting violent and depraved crimes against the person' (R. 46)" (appellee's original brief in this Court, pp. 7-8).

the conviction cannot be upheld. Any other procedure would be sheer denial of due process.

Stromberg v. *California*, 283 U. S. 359, 364-365, 367-368;
Williams v. *North Carolina*, 317 U. S. 287.

The Court of Appeals construed only one of those classifications, *i.e.* "collections of pictures or stories of criminal deeds of bloodshed or lust" (R. 45). It did not construe those parts of the statute banning "criminal news" and "police reports." Nor did it go into the question of "whether the statute extends to accounts of criminal deeds not characterized by bloodshed or lust" (R. 46). The conviction herein by the Court of Special Sessions could very well have been made under one of these other classifications. There is no way of telling under which classification Special Sessions convicted defendant. Therefore, the application of the Court of Appeals' construction to this defendant is not compatible with the Fourteenth Amendment.

Stromberg v. *California*, 283 U. S. 359, 364-365, 367-368;
Williams v. *North Carolina*, 317 U. S. 287.

Furthermore, no court, not even the Court of Appeals, has ever held that the magazines herein are "vehicles for inciting violent and depraved crimes against the person." This has been shown in Point I of this brief, at pages 5 to 6.

Even if there had been such a finding, this Court is not compelled to accept it. This Court may examine the magazines and decide whether or not they have the effect necessary to sustain the conviction.

Fiske v. *Kansas*, 274 U. S. 380.

A brief description of the contents of the magazines is set forth at pages 10 to 11 of appellant's original brief in this Court, and shows that the magazines do not incite to crime. This is substantiated by a reading of the magazines themselves. Therefore, the conviction cannot be sustained even on that ground.

In concluding this brief, I wish to refer to the case of *Mutual Film Corp.* v. *Ohio Industrial Commissioners,* 236 U. S. 230, mentioned on a previous argument of this appeal. That case was decided in 1915. At that time, motion pictures were considered merely a form of entertainment, like vaudeville. That case approved a prior restraint, distinguishing motion pictures from the press. Prior restraints have been expressly condemned where the press is concerned (*Near* v. *Minnesota,* 283 U. S. 697). Between the time the *Mutual Film* case was decided, and now, the clear and present danger principle has been established (*Bridges* v. *California,* 314 U. S. 252; *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624; *Thomas* v. *Collins,* 323 U. S. 516), and the First Amendment's guaranty of a free press has been held to be protected by the Fourteenth Amendment from impairment by the States (*Douglas* v. *Jeanette,* 319 U. S. 157, 162). In addition, this Court has since then held that the right of free speech and free press is not confined to any field of human interest (*Thomas* v. *Collins,* 323 U. S. 516). It is doubtful whether the *Mutual Film* case would be followed to-day. Prof. Chafee in *Free Speech in the United States,* at page 544 and at pages 547 to 548, urges that the rule enunciated in the *Mutual Film* case should be changed.

CONCLUSION

The judgment of conviction should be reversed, and the information against appellant dismissed.

Respectfully submitted,

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October 14, 1947.